STATE OF MICHIGAN

COURT OF APPEALS

WHISPERING PINES GOLF CLUB LLC, Plaintiff-Appellant,	UNPUBLISHED September 22, 2005
v	No. 254672 Michigan Tax Tribunal
TOWNSHIP OF HAMBURG, Defendant-Appellee.	LC No. 259437

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

This tax assessment appeal is before this Court a second time. The parties dispute whether the Michigan Tax Tribunal erred in how it followed the remand instructions of *Whispering Pines Golf Club LLC v Township of Hamburg*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2003 (Docket No. 233218) ("*Whispering Pines*"). We find that the tribunal did err and we reverse and remand.

Petitioner owns the property at issue, which is an eighteen-hole golf course located in Hamburg Township between Brighton and Ann Arbor. Respondent adopted the income approach for determining the true cash value, assessed value, and taxable value of petitioner's property. Integral to determining the expected annual income of the property is the calculation or projection of the annual number of rounds of golf that can be played on the property. That figure is divided between weekday and weekend rounds because petitioner charges a higher fee for the latter. While petitioner does not contest the use of the income method of valuation, it does challenge respondent's application of it. The focus of this appeal is the number of annual rounds.

Susan Murray, respondent's appraiser, testified that the average number of annual rounds at comparable golf courses was over 40,000. She called her estimate that petitioner's property could expect 31,500 annual rounds conservative. In calculating income, she allocated the total number of rounds as forty per cent weekday and sixty per cent weekend. She spoke with other golf courses to get the 40/60 figure. According to simple computation of Murray's figures and the 40/60 proportion, petitioner could expect 12,600 weekday rounds and 18,900 annual weekend rounds. Petitioner challenged the figure of 18,900. Assuming that a group of four players would start every few minutes, about two hundred golfers can play a round every weekend day. Murray conceded that under these assumptions her total weekend figure would take forty-seven weekends or eleven months to complete even though golf in Michigan typically

can only be played from April through October. She surmised that perhaps more golfers could be accommodated in a day and that maybe the 40/60 ratio was inaccurate.

The tribunal released it opinion and accepted respondent's income approach and Murray's number of weekday and weekend rounds that petitioner could expect.

Petitioner appealed a number of issues to this Court, including the tribunal's finding of number of expected annual rounds. According to this Court:

> A quick bit of multiplication shows that Murray's empirical evidence of the *total* number of golf rounds [of 31,500] is not mathematically impossible, even in Michigan: assuming that golf can be played in Michigan from April through October – which is 214 days-and assuming that a course can accommodate six foursomes starting per hour over an eight-hour period, which allows for 192 people – then multiplying 214 days by 192 players yields a total of 41,088 rounds that could be accommodated, a figure well in excess of Murray's 31,500 estimate. [*Whispering Pines*, 10 (emphasis in original, footnotes omitted).]

But these same assumptions mean only 11,520 weekend rounds, which was well short of Murray's 18,900. *Whispering Pines*, 10.

> We note that while the figures underlying the estimate of the likely number of total annual rounds were based on empirical information from other courses, the number of weekend rounds was calculated based on the estimates of employees at various golf courses as to the *estimated ratio* of weekday to weekend rounds rather than actual figures. [*Whispering Pines*, 10.]

Noting that Murray indicated her 60/40 ratio could be inaccurate, the Court also observed that the possibility of poor weather making golf impossible on some weekend days was "well nigh inevitable." *Whispering Pines*, 10. The Court reversed the tribunal:

> We conclude that the estimate of weekend rounds was not supported by competent, material, and substantial evidence and, on remand, instruct the Tax Tribunal to recalculate, with the foregoing concerns in mind, the number of likely weekend rounds Whispering Pines could accommodate in a year, and adjust the final estimate of value accordingly. [*Whispering Pines*, 10 (footnote omitted).]

On remand the tribunal found as follows. Golf can be reasonably played in Michigan from April to October with some possibility of inclement weather making golf impossible on some weekend days during those months. Each weekend during the season 384 players can play assuming six foursomes starting play each hour for an average of eight hours per day times two days per weekend. Assuming thirty weekends a season means a total of 11,520 rounds, alongside which the tribunal noted that petitioner estimated 10,080 rounds. The tribunal found Respondent's original estimate of 31,500 rounds appropriate and reduced the weekend rounds to 11,520. However, it also raised the number of weekday rounds from 12,600 to 19,980 to reach the same total of 31,500.

Petitioner moved for reconsideration, which the tribunal denied. Petitioner appealed as of right.

This Court will uphold the factual findings of the tribunal unless they are not supported by competent, material, and substantial evidence on the whole record. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 533; 669 NW2d 594 (2003). This Court may also overturn the tribunal for committing an error of law or adopting a wrong legal principle. *Id.* at 532.

The tribunal erred because it relied on a factual finding that lacked evidentiary support. It implicitly set the ratio of weekday to weekend golf rounds at 63/37 when it found that petitioner could expect 19,980 weekday and 11,520 weekend rounds for an annual total of 31,500. No evidence in the record suggested that petitioner could expect to sell so many greater golf rounds during the week. The tribunal may have the discretion to determine the proper weight to give the evidence. *Teledyne Continental Motors v Muskegon Twp,* 163 Mich App 188, 191; 413 NW2d 700 (1987). But it does not have the discretion to give weight to nonexistent evidence.

The only evidence on the ratio of weekday and weekend golf was to the contrary and came from the testimony of respondent's own appraiser. She testified that she spoke with other nearby golf courses, which estimated their respective splits. She averaged them out to about 40/60, with the larger percentage of rounds falling on the weekend. Admittedly, this Court noted that her approach to determining total rounds from the same courses was based on "empirical information" rather than on estimates, which is what was used for the ratio. *Whispering Pines,* 10. However, this Court did not hold that this difference meant that the ratio was not based on competent, material, and substantial evidence. Competent, material, and substantial evidence requires more than a scintilla, but less than a preponderance. *Canterbury Health Care, Inc v Dep't of Treasury,* 220 Mich App 23, 28; 558 NW2d 444 (1996). The testimony of respondent's appraiser as to the 40/60 ratio, particularly in the context of a record devoid of any other evidence, was more than a scintilla. The tribunal should therefore have held to that ratio when it recalculated petitioner's annual weekend rounds.

The tribunal also erred in its interpretation of this Court's remand instructions. "The power of a lower court on remand is to take such action as law and justice require that is not inconsistent with the judgment of the appellate court." *Waatti & Sons Elec Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002). The tribunal made much of the total annual round figure of 31,500. But this Court never set that figure in stone.[1] We merely commented upon the mathematical possibility of accommodating that many rounds at a Michigan golf course. Nothing in the remand instructions authorized increasing the annual weekday rounds from 12,600 to 19,980, an increase of nearly 59%. As noted in our earlier opinion, reallocating the number of rounds subtracted from the weekend figure to the weekday figure did technically "adjust the final estimate of value" because of the difference in fees between the two categories

[1] Even if this analysis contradicts the earlier decision of this Court, law of the case doctrine does not bind this Court when it reverses and remands for resolution of an issue of material fact, which is what happened in the earlier decision. *Brown v Drake-Willock Int'l,* 209 Mich App 136, 144; 530 NW2d 510 (1995).

of rounds. But it otherwise rendered remand unnecessary because the tribunal effectively tied its hands when it insisted on a total figure of 31,500. Under this reading of the remand instructions, this Court may as well have set the number of weekend rounds itself and then shifted the difference to the weekdays. Moreover, this Court referred to the ratio evidence when it instructed the tribunal to "recalculate, with the *foregoing concerns* in mind, the number of likely weekend rounds . . . ." *Whispering Pines*, 10 (emphasis added). The manner in which the remand was effectuated actually ignored those concerns.

This Court's statement "[t]he remainder of [the tribunal's] findings were adequately supported," *Whispering Pines*, 13, should not be interpreted to allow the tribunal to increase the number of weekday golf rounds. By reversing the tribunal's number of weekend rounds, this Court necessarily reversed the tribunal's implicit initial finding of the ratio between weekday and weekend golf rounds. The tribunal therefore had to set that ratio according to competent, material, and substantial evidence before it. That evidence pointed to only one answer: 40/60.

We reverse the tribunal's finding of 19,980 annual weekday golf rounds and a weekday/weekend proportion of 63/37. We remand the case to the tribunal to recalculate the value of the property based on income from a reconstructed golf rounds number. Our earlier opinion only shows the impossibility of Murray's weekend number of 18,900 golfing rounds. *Whispering Pines*, 9. The discussion concerning 11,520 weekend golfing rounds was this Court's extrapolation, not a finding. The tribunal, after receiving evidence on remand, merely fixed the weekend golf rounds at 11,520 – a number that petitioner does not contest. The number of weekend golfing rounds was for the tribunal to determine. The remand order did not include a revisiting of the weekday rounds of golf.[2] Therefore, we remand again for the tribunal to recalculate the number of golfing rounds to arrive at the income approach to evaluation.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio

[2] We note the earlier opinion resulting in a remand found fault with the weekend rounds of golf projection as not being supported by competent, material, and substantial evidence. The tribunal accepted this Court's extrapolation of 11,520 weekend rounds. If the tribunal had simply added the extrapolated number to the undisturbed weekday rounds projection, we could understand the analysis although the ratio of weekday to weekend play would be altered. Murray had allowed that the ratio may be "off." *Whispering Pines*, 10.